SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE:
CYNTHIA A. HOLLOWAY
NO.: 00-143
_____/

Florida Supreme Court
Case No.: SC00-2226

RESPONSE TO JUDGE HOLLOWAY'S MOTION TO DISMISS AND MOTION FOR SANCTIONS

Special Counsel to the Judicial Qualifications Commission ("JQC") files this Response to Judge Holloway's "Motion to Dismiss and Motion for Sanctions for Bad Faith Conduct by JQC and Prosecutorial Misconduct" and states:

In this motion, Judge Holloway first seeks review of a "Motion to Dismiss Proceedings due to Bad Faith of the Judicial Qualifications Commission" filed September 6, 2001, claiming it was "never given appropriate consideration by the JQC." (Motion to Dismiss, p.1). Judge Holloway makes no further argument here concerning her allegations contained in this motion, nor points to any erroneous court ruling. Instead she simply attaches it as an exhibit claiming that "this Court had original jurisdiction" to consider it. (Motion to Dismiss, p.1).

Judge Holloway is wrong on both counts. Contrary to suggestion, this motion was given consideration and **rejected** by the JQC during a telephonic hearing conducted by The Honorable Judge James Jorgenson on September 17, 2001. There is no transcript of the hearing. See Applegate v. Barnett Bank of Tallahassee, 377 So.

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2d 1150 (Fla.1979). Moreover, this Court has **review jurisdiction** over JQC proceedings, **not** "original jurisdiction." Article V, §12, Florida Constitution. For sake of consistency, a copy of the JQC's Response to Judge Holloway's Motion to Dismiss which was filed below is attached. (App.1).

Judge Holloway next claims that since the filing of the first Motion to Dismiss "there have been further events relating to bad faith conduct of the JQC as well as prosecutorial misconduct" warranting dismissal. (Motion to Dismiss, p.2). These further accusations were not presented to the Hearing Panel, nor ruled upon. Absent findings from the hearing panel, it is respectfully submitted that this Court is without jurisdiction to entertain this motion. Article V, §12 (c)(1), Florida Constitution (the supreme court may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the commission). However, as the motion impugns the integrity of the proceedings and the JQC itself, the following response is provided.

A. JUDGE HOLLOWAY'S ACCUSATIONS OF PROSECUTORIAL MISCONDUCT ARE BASELESS AND UNDESERVED.

Judge Holloway makes a grievous and unsupported charge of prosecutorial misconduct that "Special Counsel has proffered perjured testimony in these proceedings." (Motion to Dismiss, page

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3).[1] Judge Holloway asserts that the testimony of Randy Emmerman, in connection with Charge 6 of the Amended Charges[2], was a "complete fabrication" (Motion to Dismiss, p.5) and that it was "most startling" that Special Counsel knew or should have known of the true facts before trial which were covered in the deposition of Jeanne Tate taken prior to the JQC hearing. (Motion to Dismiss, p. 6).

These accusations against Special Counsel are completely false, and are nothing more than a blatant attempt to shift the focus away from **Judge Holloway's conduct**, which is the conduct at issue here. This strategy is the epitome of the oft used phrase "the best defense is a good offense."

The issue in Charge 6 was whether Judge Holloway used the power of her position to voluntarily interject herself in a purely personal matter to benefit a friend. This was not a case which

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[1] Proffering perjured testimony violates at least two Rules of Professional Conduct:

> **4-3.3 (a)(4)** - "A lawyer shall not knowingly: permit any witness . . . to offer testimony . . . that the lawyer knows to be false."
>
> **4-8.4(c)** - "A lawyer shall not: engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[2] Charge 6 of the Amended Charges was **dropped** during the proceedings. It alleged that Judge Holloway "lent the prestige of [her] judicial office to advance the private interest of a personal friend Jeanne T. Tate, Esquire" by drafting a temporary injunction order to prevent the cutting of trees in front of Mrs. Tate's law firm.

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randomly landed in Judge Holloway's division like any other case.[3] Judge Holloway went out to her friend's law office, went "toe to toe with the tree cutter" and then participated in the drafting of a temporary injunction, which the Judge signed on the spot. Judge Holloway attempts to obfuscate the abuse of power and place the blame elsewhere by highlighting testimonial discrepancies on issues which were beside the point.

The claim of "perjured testimony" is based on the Judge's contention that Randy Emmerman was **not present** on the date and at the time of the so-called "tree cutting" incident, despite his testimony to the contrary. Emmerman unquestionably testified that he was present and witnessed the events of July 10, 1999 when Judge Holloway signed a temporary injunction prepared by Jeanne Tate. (T. 259).

To establish that this testimony was false and known to be false by Special Counsel, Judge Holloway states, "Jeanne Tate, a local lawyer testified on behalf of the defense that Mr. Emmerman was not even present when these events occurred." Examination of the Tate testimony does **not** support this statement. Ms. Tate was asked: "Did you ever see [Emmerman] out there that day, that Saturday morning?" She answered: "No, sir, **I don't believe so.**" (T. 405, emphasis supplied.) Later, in questioning by a panel member, the following colloquy took place:

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[3] If it had, it would have been incumbent upon Judge Holloway to recuse herself.

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JUDGE GEHL: Mr. Emerson [sic] was there as well. Correct?

THE WITNESS [Tate]: I did not see Mr. Emerson [sic]. **If he was there, he did not identify himself as such during the entire time.** (T.453, emphasis added.)

The deposition testimony of Jeanne Tate which was so "startling" is equally equivocal:

"Q. Do you know somebody by the name of Randy Emmerman?

A. I don't know him, but I know that he was involved in this incident.

* * * *

Q. Do you have a recollection of meeting or seeing Randy Emmerman at the scene of your office on July 10th of 1999?

A. **I don't recall.** * * *" (Depo. of Tate, p. 35, emphasis added).

* * * * *

Q. Do you know now today if Judge Holloway had a conversation with Randy Emmerman on July 10th of 1999?

A. **I don't recall that.** (Depo. of Tate, p. 44, emphasis added).

Judge Holloway has irresponsibly charged Special Counsel with knowingly presenting false testimony based on statements of Jeanne Tate who, at best, did not recall whether Emmerman was present on July 10, 1999 and who stated on questioning by a panel member that if he was there he did not identify himself.

Unlike the evidence of Judge Holloway's actions in entering the injunction, the evidence involving the side issue of Emmerman's

presence at the "tree incident" was in sharp conflict.[4] As aptly stated in the Comment to Bar Rule 4-3.3:

> **The advocate's task is to present the client's case with persuasive force.** Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, **an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.** (Emphasis added).

Case law is in accord with these principles. The Florida Bar v. Brown, 790 So. 2d 1081 (Fla. 2001)(the referee is in a unique position to assess the credibility of witnesses and resolve conflicts in the evidence); The Florida Bar v. Elster, 770 So. 2d 1184 (Fla. 2000)(same); The Florida Bar v. Fredericks, 731 So. 2d 1249, 1251 (Fla. 1999)(same); see also Porzio v. Porzio, 760 So. 2d 1075 (Fla. 5th DCA 2000) (It is the role of the factfinder to resolve conflicts in the evidence and to weigh credibility of witnesses); Ferry v. Abrams, 679 So. 2d 80 (Fla. 5th DCA 1996)(same).

Moreover, **the tree charge was withdrawn.** (T.468). It was no longer an issue in the proceedings, and it was not mentioned by

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[4] Judge Holloway's claim of foul, based on the proffer of testimony from Steve Graham from the City of Tampa Parks Department regarding whether or not a permit had been issued to Mr. Emmerman, also rings hollow. The proffer was made outside the presence of the panel. This proffer serves only to highlight the conflicting nature of the evidence as to whether Mr. Emmerman had verbal permission to cut the trees. (T.486-495). Moreover, this charge had little to do with whether the tree cutter had a permit or verbal permission to do his job, but whether Judge Holloway improperly injected herself into a dispute outside the courtroom.

Special Counsel in closing. Judge Holloway nonetheless claims that the Hearing Panel was "tainted" and "poisoned" by the "inappropriate" testimony of Randy Emmerman. (Motion to Dismiss, p.7,8). This is belied by the statement of the Chair of the Hearing Panel that "You've dismissed the charge, and **I think that's the end of it.** I don't need any more witnesses on the tree issue." (T.471, emphasis added). As addressed further in our Answer Brief, it is also belied by the **leniency** of the JQC Hearing Panel's recommended discipline of a public reprimand, a 30 days suspension without pay, and "reasonable costs" to be determined at a later date, which rejected the Special Counsel's recommendation of removal.

As another example of the "unfairness of these proceedings," Judge Holloway takes issue with Special Counsel's argument to the Panel that the Judge's admitted improper contact with Judge Stoddard which resulted in his recusal, had the unfortunate consequence of a four-year old child remaining in a shelter some additional period of time. (Motion to Dismiss, p. 11).

The crux of Judge Holloway's complaint appears to be the testimony of Mark Johnson, which she deems to be "highly inflammatory." (Motion to Dismiss, p.11).

This is Mark Johnson's explanation on this issue:

> [b]ecause Judge Stoddard was unable to hold the shelter review hearing that he had already scheduled for Friday, March 10th. He was unable to do that. And the new judge said - you know, the file in this case was this big.

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> She said, "I'm not - this child stays in shelter until I'm comfortable enough, until I get up to speed."
>
> So we had two or three hearings a week in front of Judge Maye. And all the while, neither Robin nor I could talk with P.A. by telephone. We could see her one hour a week down here at the courthouse with people present. She was in shelter for another five weeks, thinking God knows what, that she'd been abandoned. (T. 166-67).

Judge Stoddard testified that while Judge Holloway's improper contact was not the only reason he was considering recusal, this confrontation tipped the balance in favor of it. (T. 81, 91-92).

Here is the Special Counsel's argument to the Panel:

> You know, I think that we have to realize the consequences of our actions. And Judge Holloway wasn't acting in a vacuum. I mean, her actions had an incredible impact on a little girl who remained away from her family for five weeks. (T.815).

Special Counsel also acknowledged that there were other reasons that Judge Stoddard was "wrestling with the idea of possibly recusing himself" in her closing argument. (T.815). While understandably painful for Judge Holloway to acknowledge, it is **fact** that the child remained in a shelter for some additional length of time in part because of her improper conduct.[5] This is exactly what the Special Counsel argued. Her comments were absolutely true and a fair comment on the evidence presented. See

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[5] The Panel found Judge Holloway guilty of improper contact with Judge Stoddard but indicated it was taking her apology into consideration, as well as Judge Stoddard's continued high regard for her as a judge.

Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000); Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Craig v. State, 510 So. 2d 857 (Fla. 1987)(not improper for counsel to characterize conduct during argument providing characterization is supported by evidence).

Judge Holloway levels additional unfounded criticism at Special Counsel for dropping charges at the hearing for "tactical reasons" because it limited the Judge's ability to "cross-examine" witnesses. (Motion to Dismiss, p.13). Judge Holloway had equal ability to present evidence and call witnesses. Contrary to suggestion, JQC proceedings are adversarial in nature and Special Counsel was under no obligation to present Judge Holloway's side of the story. See e.g. Kandekore v. Florida Bar, 766 So. 2d 1004 (Fla. 2000) (the proceedings before a referee are adversarial, thus the Bar is under no obligation to present "both sides" of the case at the hearing).

In sum, there is no evidence that the Special Counsel employed the "win at all costs" strategy of which she is accused. The insults directed at her throughout the motion are both unfair and undeserved. The facts here speak louder than Judge Holloway's overblown rhetoric, which should be ignored and her motion denied.

B. JUDGE HOLLOWAY WAS ACCORDED FUNDAMENTAL FAIRNESS THROUGHOUT THESE PROCEEDINGS.

Judge Holloway next makes what appears to be essentially a due process challenge based on her perceived "lack of bifurcation",

questioning the "fundamental fairness of these proceedings." (Motion to Dismiss, p.16). Procedural due process requires that a judge be given notice of the proceedings, that the judge be given an opportunity to be heard, and that the proceedings against the judge be essentially fair. In re Graham, 620 So. 2d 1273, 1276 (Fla.1993), cert. denied, 510 U.S. 1163 (1994); In re Kelly, 238 So. 2d 565, 570-71 (Fla.1970), cert. denied, 401 U.S. 962 (1971); see also Fla. Jud.Qual.Comm'n R. 16(a). Additionally, due process requires the JQC to be in substantial compliance with its procedural rules. In re Inquiry Concerning a Judge, 357 So. 2d 172 (Fla.1978).

Without citation to authority and providing little analysis, Judge Holloway contends that these proceedings were tainted by a lack of bifurcation between the Investigative Panel and the Hearing Panel. Judge Holloway takes particular exception to the presence of Judge Wolf, the Chair of the Investigative Panel, during the proceedings before the hearing panel. Judge Holloway asserts *inter alia* that "there was absolutely no reason for Judge Wolf to be present" and that his presence "could serve to intimidate the Hearing Panel." The JQC Rules completely dispense with this argument. Rule 7(a) specifically states that the "Hearing Panel shall receive, hear and determine formal charges **from the Investigative Panel**." (Emphasis added). See also JQC Rule 2 defining "Hearing Panel" using identical language. Judge Wolf had every right to be present and indeed it was his responsibility as

Chairman of the JQC to be present during the presentation to the hearing panel.

There is absolutely no truth to Judge Holloway's final complaint that the so called bifurcation problem led to the derailment of settlement negotiations. (Motion to Dismiss, p.18-20). The JQC can only "settle" cases by consensus, and even then its proposed recommendation is subject to rejection by this Court. The membership of the Commission is constitutionally mandated, including a mix of judges, selected by their peers, lawyers, selected by the Florida Bar, and governor appointees, including laypeople. Every member holds an equal vote. Fla. Const. art. V, §12(a)(1)(a),(b)&(c). Here, there were **multiple** instances of misconduct by this Judge - and there was **no** consensus in favor of the judge's recommended "settlement." Regardless of which panel the Judge deemed more favorable, the fact is, she would still have an insurmountable burden to demonstrate prejudice. Even if she could gather the necessary number of votes, any recommendation of settlement would still have to be approved by this Court. She is in the same posture here - any JQC recommendation of discipline still must be approved, rejected or modified by this Court, in its review capacity.

Judge Holloway received all the process due her in these proceedings. Her fundamental lack of understanding of the process does not change this result. While her motion is strong on rhetoric and consumed with accusations of bad faith and misconduct,

it sorely lacks any support in law or fact. Judge Holloway's Motion to Dismiss should be denied in all respects.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished as indicated this 15 day of March, 2002 to:

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